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IN THE
THE UNITED STATES SUPREME COURT

OCTOBER 1997 TERM

ROBIN MILLET, widow of Lionel Millet and on behalf of her minor children Lionel N. Millet Gennie Millet and Brady Millet, Et Al

Petitioners

VERSUS

JACK H. WOODWARD, ALTA WOODWARD, ET AL.
PLAINTIFFS;
JOHN D. VERSEN, RAMON HUERTA, SIMON GARCIA, ET AL.
PLAINTIFFS;
AND
NOR-AM CHEMICAL COMPANY, ALVIN TORK
DEFENDATS

Respondents

FEDERAL CLASS ACTION
PRODUCTS LIABILITY, TOXIC EXPOSURE

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

[illegible]

Michael Conrad Smith
8312 Florida Blvd., Suite 201
Baton Rouge, LA 70806
Phone: (504) 354-1265

(504) 293-5500

BEST AVAILABLE COPY

39pp

QUESTIONS PRESENTED FOR REVIEW

1. Was the Millet Group of Louisiana Citizens' appeal No. 97-6044 to the Eleventh Circuit frivolous.

2. Was the Millet Group's counsel actions in the 11th Circuit sanctionable in light of the prevailing authorities.

3. Was there a violation of counsel's right to due process, and those recognized by FRAP 38 for the court's failure to provide counsel with an opportunity to be heard on the issues for sanctions and motion to dismiss the appeal.

4. Did the Eleventh Circuit court of Appeal erred in not taking notice of this honorable Court's ruling in Amchem v. Windsor (96-270 June 25, 1997) affirming the Third Circuit ruling in Georgien v. Amchem Products, Inc., 83 F.3d 610, 64, (May 10, 1996).

5. Were the rights of the Woodward class identical to those of the Georgien class, wherefore the Eleventh Circuit declaration that the Millet Appeal was frivolous constitute a split between the circuits.

6. Were the Millet Group members, members of the Woodward class having the right to object to the proposed settlement and the granting of attorneys fees.

7. Was there a valid waiver of rights and settlement in the Woodward v. Nor-Am case, that will make the Millet appeal of no merits.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
LIST OF PARTIES TO THE PROCEEDINGS iii
JURISDICTION OF THE COURT v
JURISDICTION v
STATEMENT OF BASIS FOR JURISDICTION v
OTHER vi
STATUTORY AUTHORITY vi
PETITION vii

APPENDICES :

A. LETTER JULY 16 FROM THE CLERK OF THE 11TH CIRCUIT (NOTICE OF NO ACTION).
B. JULY 16, 1997 JUDGMENT BY THE 11TH CIRCUIT (APPEAL FRIVOLOUS AND SANCTIONS).
C. JULY 16, 1997 ORDER FROM THE 11TH CIRCUIT (DENYING SECOND MOTIONS FOR SANCTIONS)
D. APRIL 30, 1997 ORDER FROM THE 11TH CIRCUIT (DISMISSING APPEAL AND IMPOSING SANCTIONS, CONSIDERING ALL OTHER PENDING MOTIONS MOOT)
E. DECEMBER 4, 1997 ORDER FROM THE SOUTHERN DISTRICT OF ALABAMA ADOPTING THE MAGISTRATE'S RULING OF OCTOBER 11, 1996.
F. REPORT AND RECOMMENDATION AUTHORED BY MAGISTRATE JUDGE WILLIAM CASSADY OF THE SOUTHERN DISTRICT OF ALABAMA

LIST OF PARTIES

PETITIONERS ARE:

The following individuals, , Robin Millet (widow of Lionel Millet and on behalf of her minor children, Lionel N. Millet, Gennie Millet, and Brandy Millet), Bessie Jackson (on her own capacity and on behalf of her minor children), Rosa Hall (widow of Severia Hall and on behalf of her minor children), Shelby Stevens and his spouse Mary Ann Stephens, Frank Williams, Ella Williams, Hattie Davis, Louis Davis, Donald Hawkins, Robert Johnson, Charles Pierson, Andrea Redditt, Jerry Scott, Delmar Stewart, Junius Thomas, Glenn Washington, Dorothy Washington, Shermar Washington, Faye Williams, James Young, Annette Baker, Raymond Brown, Kenneth Dominque, Mercedes Dominque, Kelvin Duncan, James Grallegro, Alex Germany, Darryl Green, Lawrence Lott, Patricia Lott, AlbertHA Matthews, Patricia Riley, Lionel Saylor, Al Weams, Mose Williams, Rusel Wilson, Elvin York, Charles Williams, Cheryl Williams, Calvin Dominque, Aaron Williams, Allen Weatherford, Willie Roddy, Andrew Fornest, Ronnie Little, Annette Baker, Ethel Valentine, Randy Pero, Quindell Washington, Emmanuel Howard, Constance Howard, Howard Bernice Johnson, Otis Jones, Marie Jofferion, Eddie Holland, Darryl Barber, Leroy Bartley, Hurley Henson, Johnson Leatha Darville, Rebecca Thompson, Leslie Thompson, Sedric Crawford, Phyllis Marcelle, Earnest Larks, Micheal Stephens, Norman Gordon, Gerdaline Sharper, Wayne Robinson , Galdys Martin, Donald Thomas, Lenis Dukes, Alvin Grant, Eugene Mills, Raymond Brown; and Albert Simpson herein after called the (Millet Group).

JURISDICTION OF THE COURT

1. Jurisdiction of this honorable court is being invoked pursuant to:

Rule 10. Considerations Governing Review on Writ of Certiorari *(in pertinent part states)*

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; (*emphasis added*)

2. Statement of the basis of jurisdiction:

On July 16, 1997 the Eleventh Circuit Court of Appeal declared an appeal notice filed by the Millet Group to constitute a "Frivolous Appeal". The court without permitting a hearing, further ordered undersigned to pay monetary sanctions in the amount of $2,000.00 to class counsel. The court also considered a petition for a rehearing to be a motion for reconsideration denying the relief sought. The Eleventh Circuit (by its clerk) made a ruling that a timely motion to leave to amend petition for a rehearing, which motion was filed prior to any final conclusion of the underlying matter, will not be acted upon. Said motion was predicated on this honorable court's decision in Amchem v. Windsor (US S. Ct. 96-270). [a copy of judgment attached herein with]

3. Other :

The matter of Woodward v. Nor-Am chemical company (CA 94-0780-CB-C) is of such imperative public importance that would warrant this honorable courts review of all actions taken therein.

4. The Statutory provisions:

28 § U.S.C. 1912 and Rule 38 of the Federal Rules of Appellate Procedure.

Rule 23 of the Federal Rules of Civil Procedure.

Due Process Clause as impeded in the United States Constitution.

PETITION

NOW INTO COURT, Through undersigned counsel comes the MILLET GROUP, which group consists of a number of citizens of the State of Louisiana, who will have certain rights affected by the proposed class settlement in the above captioned matter. This group further represents a number of citizens of the United States whose lives were affected by virtue of their exposure to a severely incapacitating chemical substance (chlordimeform).

1. Petitioners respectfully request that this honorable court review the actions of the 11th Circuit Court of Appeals in declaring their notice of appeal to be a frivolous appeal. This Group of Louisiana Citizens, were never provided any opportunity to submit their appeal brief and their argument in support of their appeal. The court's declaration of frivolity of an appeal on basis of the filing of a notice of appeal was improper.

2. Petitioners, on basis of the recent decision rendered by the United States supreme Court in the matter entitled Amchem v. Windsor No. 96-270 decided on June 25, 1997, moves this honorable Court to overturn the 11th circuit decision declaring their appeal to be non-frivolous and to lift any sanctions imposed on their counsel for legal reasons will be more fully set in their brief.

3. It is also the contention of under signed counsel that his constitutional right to due process has been violated by the 11th Circuit in that he was denied an opportunity to be heard on the issues raised in the motions for sanctions filed against him as it will be detailed in the brief in support of this petition.

4. Rule 38 FRAP provide the requirement for imposition of sanctions, as being

   A. Notice, the filing of the motion for sanctions shall serve as sufficient notice of probability of being sanctioned. See advisory committee notes (1994).

   B. An opportunity to be heard and to show cause why an attorney should not be sanctioned. See advisory committee notes (1994). See also the US Supreme Court's opinion in *Roadway Express, Inc. v. Piper, 447 U.S. 752,767 (1980).*

   the motion for sanctions was defective, class counsel filed a memorandum and then five days latter filed a motion seeking sanctions

5. THE 11TH CIRCUIT COURT OF APPEAL OVERLOOKED THE FACT THAT: GEORGIAN V. AMCHEM PRODUCTS, INC was being reviewed by the supreme court under the title of AMCHEM PRODUCTS, INC., et al., Petitioners, v. George WINDSOR, et al., Respondents. No. 96-270. The case encompass serious issues definitely affect the status of Woodward v. Nor-Am. And that, petitioners raised similar issues to those raised in *Georgine v. Amchem,*[1] *May 10, 1996 decision.*

6. THE MILLET GROUP WERE GIVEN NO OPPORTUNITY TO FILE THEIR APPEAL BRIEF [2].

---

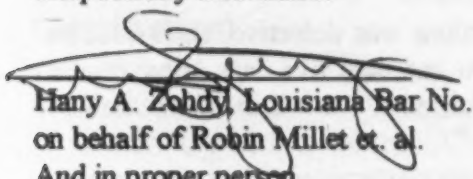
[1] [Georgine v. Amchem Products, Inc., 83 F.3d 610, 64, (May 10, 1996) , rehearing and suggestion for rehearing in banc denied (Jun 27, 1996); Certiorari Granted by US S.Ct. "Amchem Products, Inc. v. Windsor", 117 S.Ct. 379, 136 L.Ed.2d 297, (NO. 96-270)]

[2] Attorney ordered to pay money as sanction for filing frivolous suit or appeal is entitled to due process of law including opportunity for hearing if factual question concerning propriety of sanctions is raised; hearing is not required where conduct sought to be sanctioned consists of making objectively groundless legal arguments in briefs filed before appellate court; text of Federal Rules of Appellate Procedure, Rule 38, and previous decisions applying it, provide all notice attorney could reasonably demand. Hill v

Wherefore, there were no legally groundless argument before the court to determine that the appeal was frivolous. The only thing came before the court was a notice of appeal in which a summary of the issues was presented.

Wherefore, this honorable court should grant this petition for writ of certiorari allowing petitioners to file their brief addressing all the issues.

Respectfully Submitted:



Hany A. Zohdy, Louisiana Bar No. 21409
on behalf of Robin Millet et. al.
And in proper person

Norfolk & W. R. Co. (1987, CA7 Ind) 814 F2d 1192, 124 BNA LRRM 3057, 106 CCH LC ¶ 12248, 7 FR Serv 3d 492. (emphasis added)

Appendix A

United States Court of Appeal
Eleventh Circuit
56 Forsyth Strect, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names Of Parties

July 16, 1997

MEMORANDUM TO ADDRESSES:

RE: 97-6044 Woodward v Nor-Am Chemical Co.

(DC DKT. No.: 94-00780 CV-CB-C

The following action has been taken in the referenced case:

* (X) Mr. Zohdy: No action will be taken by the court on your Motion To Amend Rehearing, etc. in light of the court's order of July 16, 1997.

Sincerely,

MIGUEL J. CORTEZ, Clerk
Reply to: (404)331-3833 (AEB)

MOT-2 (1/93)

Appendix B

IN THE UNITED STATES COURT
FOR THB ELEVENTH CIRCUIT

No. 97-6044

JACK H. WOODWARD, ALTA WOODWARD, TOM LOFTIN, ET AL.,

Plaintiffs-Appellees

JOHN D. VERSEN, RAMON HUERTA, SIMON GARCIA, ET AL.,

Intervenor-Plaintiff,

ROBIN MILLET, widow of Lionel Millet and on behalf of her minor children Lionel N. Millet Gennie Millet and Brady Millet,

Movant-Appellant,

versus

NOR-AM CHEMICAL COMPANY, and ELVIN TORK,

Defendant Appellee

On Appeal from the United States District Court for the Southern District of Alabama

BEFORE: HATCHETT, Chief Judge, TJOFLAT and COX, Circuit Judges. BY THE COURT:

This matter is before this court on Timothy E. Eble's "itemized statement as to attorney fees, costs and expenses, H and Appellant's "re-hering [sic] on behalf of Mieel [SIC] group.

On 4/30/97, this court granted the motions filed by Mr. Eble's clients to dismiss this appeal as frivolous, and to assess attorney's fees against Appellants' counsel Hany Zohdy. This court ordered Mr. Zohdy to pay those Appellees the reasonable amount of fees they incurred filing their motions to dismiss and for sanctions, plus the fees they incurred responding to the motions Appellant filed in this appeal. The court further directed Appellees to supplement their motion for sanctions with an itemized statement as to the reasonable amount of fees they incurred.

Mr. Zohdy's motion, construed as a motion for reconsideration of the 4/30/97 order, is DENIED.

Mr. Eble's statement claims that the reasonable value of the work he performed equals $20,140.00, calculated at the rate of $400 per hour. (Mr. Eble also asks for his clients' expenses, but the court's 4/30/97 order did not grant him such expenses, and none will be awarded now.) Mr. Zohdy, on the other hand, claims that Mr. Eble's work in this appeal is worth $400.00.

Both attorney's claims are grossly unreasonable. This appeal was clearly frivolous, and Mr. Eble did not need to spend more than a week's worth of billable hours filing simple motions to dismiss and for sanctions, and defending against Mr. Zohdy's motions. Conversely, Mr. Zohdy's claim that Mr. Eble is only entitled to be paid for three hours' work is equally unrealistic. It likely took Mr. Eble three hours simply to read the voluminous, and wholly unnecessary, stack of exhibits Mr. Zohdy filed in this court.

Accordingly, this court awards Mr. Eble $2,000.00 in fees to be paid by Mr. Zohdy. This total amount equals ten hours of work multiplied by a reasonable hourly rate of $200.00.

Appendix C

IN THE UNITED STATES COURT
FOR THB ELEVENTH CIRCUIT

No. 97-6044

JACK H. WOODWARD, ALTA WOODWARD, TOM LOFTIN, ET AL.,

Plaintiffs-Appellees

JOHN D. VERSEN, RAMON HUERTA, SIMON GARCIA, ET AL.,

Intervenor-Plaintiff,

ROBIN MILLET, widow of Lionel Millet and on behalf of her minor children Lionel N. Millet Gennie Millet and Brady Millet,

Movant-Appellant,

versus

NOR-AM CHEMICAL COMPANY, and ELVIN TORK,

Defendant Appellee

On Appeal from the United States District Court for the Southern District of Alabama

BEFORE: HATCHETT, Chief Judge, TJOFLAT and COX, Circuit Judges. BY THE COURT:

Appellees' and Appellant's second motion for sanctions is DENIED.

Appendix D

IN THE UNITED STATES COURT
FOR THE ELEVENTH CIRCUIT

No. 97-6044

JACK H. WOODWARD, ALTA WOODWARD, TOM LOFTIN, ET AL.,

Plaintiffs-Appellees

JOHN D. VERSEN, RAMON HUERTA, SIMON GARCIA, ET AL.,

Intervenor-Plaintiff,

ROBIN MILLET, widow of Lionel Millet and on behalf of her minor children Lionel N. Millet Gennie Millet and Brady Millet,

Movant-Appellant,

versus

NOR-AM CHEMICAL COMPANY, and ELVIN TORK,

Defendant Appellee

On Appeal from the United States District Court for the Southern District of Alabama

BEFORE: HATCHETT, Chief Judge, TJOFLAT and COX, Circuit Judges. BY THE COURT:

The two motions to dismiss this appeal as frivolous filed by the Appellees are GRANTED. Meek v. Metropolitan Dade County, 985 F.2d 1471, 1476 (llth Cir. 1993).

The motion for sanctions filed by Appellees Jack H. Woodward, et 31-, is GRANTED. Hany A. Zohdy, Esq. is ORDERED to pay those Appellees the reasonable amount of fees they incurred filling their motions to dismiss and for sanctions, plus the fees they incurred responding to the motions Appellant filed in this appeal. Appellees are directed to supplement their motion for sanctions with an itemized statement as to the reasonable amount of fees they incurred. That statement should be supported by appropriate documents evidencing the work actually performed by Appellees' counsel. Mr. Zohdy may, within 7 days of the date Appellees' statement is served, file an objection challenging the reasonableness of fees claimed in Appellees' statement. Mr. Zohdy's objection, however, may not challenge Appellees' entitlement to fees. A specific fee award will be made by separate order.

All other pending motions are DENIED AS MOOT.

Appendix E

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JACK H. WOODWARD, et al., CIVIL ACTION NO. 94-0780-CB-C

Plaintiffs.

v.

NOR-AM CHEMICAL COMPANY,

Defendant.

ORDER

This matter is before the Court on the report and recommendation prepared by Magistrate Judge William E. Cassady at the behest of this Court (tab 210) and the memorandum in opposition to the report and recommendation filed by non-party the Millet Group (tab 211). Magistrate Judge Cassady prepared the report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), and 28 U.S.C. § 636(b)(1)(C) provides that any *party* may serve and file written objections to such proposed findings and recommendations as provided by rules of court 28 U.S.C. § 636(b)(1)(C) (emphasis added). This Court denied the Millet Group's motion for intervention into this action, and on September 30, 1996, the Eleventh Circuit Court of Appeals dismissed the Millet Group's appeal for lack of jurisdiction (tab 209). Thus, the Millet Group is not a party to this action, and as a result, they lack standing to object to Magistrate Judge Cassady's report and recommendation. Furthermore, after due and proper consideration of all portions of this file deemed relevant to the issue raised, the recommendation of the Magistrate Judge made under Fed. R. Civ. P. 54(d)(2) and Fed. R. Civ. P. 72(b) dated October 11, 1996, is ADOPTED as the opinion of this Court.

It is so ORDERED.

DONE this the 4th day of December, 1996.

S// Charles Butler

CHIEF DISTRICT JUDGE

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA :
SOUTHERN Division

NO.: Cv 94 0780-CB-C

JACK H. WOODWARD, ALTA WOODWARD,
TOM LOFTON, CINDY LOFTON and RITA SNOW
on behalf of themselves and others similarly situated,

Plaintiffs

v.

NOR-AM CHEMICAL COMPANY

Defendants

REPORT AND RECOMMENDATION

Findings of Fact

A. Introduction

1. On May 16, 1996, Chief District Judge Charles R. Butler entered findings of fact and conclusions of law, concluding that the court had subject matter jurisdiction over this class action pursuant to 28 U.S.C. § 1332, that final certification of the class for purposes of settlement was appropriate, that class counsel were qualified to represent the class and acted without conflict of interest without collusion and appropriately in negotiating the settlement,

that the settlement was fair adequate and reasonable, and that the notice satisfied the requirements of Fed. R.Civ. P. 23(c)(2) and (e) as well as the Due Process Clause of the United States Constitution. Findings of Fact and Conclusions of Law, ¶ 123. Accordingly, by final judgment dated May 16, 1996, Judge Butler ordered certification of the settlement class and final approval of the stipulation of settlement.

2. In the judgment of May 16, 1996, the court specifically retained jurisdiction over this matter to resolve issues regarding payment of attorneys fees and reimbursement of expenses. Upon motion of the parties, Judge Butler ordered that the matter of attorneys fees be referred to the undersigned to conduct any necessary hearings and to issue a report and recommendation. Pursuant to the order of referral, an evidentiary hearing was held by the undersigned on July 11, 1996.

B. The Litigation

3 . The facts underlying the settlement of this action have been thoroughly documented in the May 16, 1996 Findings of Fact and Conclusions of Law. Rather than engaging in a lengthy restatement of these facts, this court, to the extent that they bear on the issue presently under consideration, incorporates these Findings of Fact and Conclusions of Law as if fully set forth herein.

4. During the early stages of this litigation, the case was prosecuted by and through individual counsel. Later the litigation was prosecuted by and through a three member executive steering committee appointed by this court. Upon settlement class counsel shepherded the case from preliminary approval and conditional certification through the notice period, and to final approval. In the later stages, administrative class counsel have stepped in to set up the administration of the settlement.

C. **The Settlement and Its Benefits**

5. The settlement provides class members with substantial and continuing benefits. These benefits can be divided in four general categories. First, class members who qualify as NOR-AM Exposed Persons are entitled to free medical monitoring. Second, class members who qualify as NOR-AM Exposed Persons are entitled to free medical treatment for medical condition attributable to exposure to Fundal Third, class members who qualify as NOR-AM Exposed Persons are entitled to compensation for certain medical procedures and conditions. Fourth, the settlement provides supplemental payments to Ciba Exposed Persons who are settlement class members and who have received payment from the Ciba-Geigy Disease Compensation and Administration ("DCA") Fund.

6. The benefits provided by the settlement will be paid for through two funds. The Medical Monitoring and Treatment ("MMT") Fund will be funded by NOR-AM in the initial amount of

$3.5 million, and will be replenished as necessary under the terms of the settlement NOR-AM's financial responsibility to provide funds to the MMT Fund during its minimal 20-year lifetime is unlimited The DCA Fund will be funded by NOR-AM in the initial amount of $21 million, and will be replenished as necessary under the terms of the settlement. NOR-AM's obligated to provide up to $34.5 million to the DCA Fund. In the event the DCA Fund exhausts NOR-AM must continue to make compensation payments; otherwise, class members regain their rights to sue NOR-AM in the tort system.

7. The settlement, recognizing that many class members may be eligible to receive or are already receiving benefits under the *Price* settlement, was designed to work in harmony with and as a complement to the *Price* settlement.

8. The settlement values negotiated used the *Price* settlement values as a baseline and were adjusted to reflect the fact that the ratio of Fundal to Galecron used per acre was roughly 1:2. It was plaintiff's position that this ratio, as opposed to a strict market share ratio, most accurately represented the respective rates of exposure to these nearly identical pesticides.

D. Attorney Fees

9. The notice disseminated during the class notification period informed class members that class counsel and administrative class counsel would petition for an award of attorney

fees to be paid from the DCA Fund not to exceed 20% of the benefit conferred on the class. The notice also indicated that a request would be made that a portion of the attorney fees to be awarded to Administrative Class Counsel would be paid over a four year period for legal work performed in the future. *See also,* Stipulation of Settlement, ¶ XVI.

10. Upon referral to this court, a briefing schedule was set and the following fee petitions and responses were filed:

a. "Memo in Support of Joint Petition of Middlebrooks, Eble, Baker, Pendley & McKernan for an Award of Attorney Fees and Recovery of Additional Expenses Advanced in Litigation," submitted by Middlebrooks, Eble, Baker, Pendley and McKernan;

b. "Petition for Attorneys' Fees & Memo in Support Thereof," submitted by Dodson, Irving and Kees;

c. "Application by Counsel for Tom Lofton Cindy Lofton & Rita Snow for and of Attorneys' Fees & Reimbursement of Expenses," submitted by Donaldson, Harang and Bilbo;

d. "Motion by Attorneys Donald M. Briskman & Howard L. Nations for Award of Attorneys' Fees & Reimbursement of Expenses on Behalf of the Woodward Intervenors' Enhancement Group," submitted by Briskman and Nations;

e. "Response of Middlebrooks, Eble, Baker, Pendley and McKernan to Attorney Fee Petitions of Richard J. Dodson, David Vidrine Stephen Irving Maxwell Kees, Anthony Bruscato, Claude

Bilbo, Linda Harang, Stephen Murray, David Donaldson, Hany Zodhy & Chandler Loupe," submitted by Middlebrooks, Eble, Baker, Pendley and McKernan

f. "Reply Brief on Issue of Attorney Fees by 'Moppert Counsel,'" submitted by Dodson, Irving and Kees;

g. "Lofton/Snow Group's Reply to Fee Applications by Co-counsel & Objectors," submitted by Donaldson, Harang and Bilbo;

h. "Motion & Memo in Support Thereof for Attorneys' Fees on Behalf of the State of Louisiana, the Dept. of Health & Human Resources, & All Louisiana State hospital Facilities," submitted by Graddick and Loupe;

i. "Response of Defendant to Motion for Attorneys' Fees on Behalf of the Louisiana Entities," submitted by NOR-AM; and

j. "Motion for Attorney's Fees" and "Memorandum in Support of Motion for Attorneys' Fees," submitted by Zohdy

11. A review of these petitions and responses indicates that there are six "groups" of attorneys petitioning for awards of attorney fees in this action. The first group may be termed the "Woodward Group" and consists of Middlebrooks, Gardner, Eble, Baker, Pendley and McKernan. Middlebrooks and Eble are counsel for two of the class representatives, members of the court-appointed executive steering committee, class counsel and administrative class counsel. In addition, Gardner, Baker, Pendley and McKernan are administrative class counsel.

12. The second group may be termed the "Lofton/Snow Group" and consists of Donaldson, Harang and Bilbo. Donaldson, Harang and Bilbo are counsel for three of the class representatives. In addition, Donaldson is a member of the court-appointed executive steering committee and class counsel.

13. The third group may be termed the "Moppert Group" and consists of Dodson, Irving and Kees. Dodson, Irving and Kees are counsel for three of the class representatives. They are also plaintiff's counsel in the Moppert case, a Louisiana federal court action transferred to this court and subsequently consolidated into the *Woodward* action.

14. The forth group may be termed the "Enhancement Group" and consists of Nations and Briskman Nations and Briskman represent certain putative class members who opted back into the class following the addition of certain enhancements to the settlement

15 . The fifth group may be termed the "Louisiana Entities Group" and consists of Graddick and Loupe. Graddick and Loupe represent the State of Louisiana, the Louisiana Department of Health & Human Resources and all Louisiana state hospital facilities. All pleadings in this action filed by the Louisiana Entities Group were previously withdrawn, and Loupe has not been authorized to proceed in this action pro hac vice.

16. The sixth group may be termed the Millet Group" and consists of Zodhy. Zodhy represents a group of individuals who attempted unsuccessfully to intervene in this action. *See* judgment entered May 16, 1996, ¶¶ 116-117, and the dismissal of the appeal by the Eleventh Circuit (Doe. 209, September 30, 1996).

17. In these petitions and responses, the various groups detailed their contributions to the advancement of the case and, ultimately, to the benefit conferred upon the class .

18. On July 11, 1996, a bearing was held to address the issues raised in the various fee petitions and responses. Prior to this hearing, the Woodward Group, the Lofton/Snow Group, the Moppert Group and the Enhancement Group agreed to petition jointly to the court for an award of attorney fees amounting to 20% of the benefit conferred on the class. These groups also agreed that the benefit conferred should be valued at $42.5 million. Finally, these groups agreed on the manner in which this attorney fee award, if approved by **the court, should be apportioned and paid** out among the groups. The groups have requested that they be allowed to apportion any award among the group members pursuant to internal agreement. The court was duly informed of these agreements at the hearing.

19. At the hearing no objection was raised to the standing of the Woodward Group, the Lofton Snow Group or the Enhancement Group to petition for an award of attorney fees The Zodhy Group initially objected to the standing of the Moppert Group, but this objection was withdrawn. Additionally, at the hearing, the Zodhy Group withdrew its petition for an award of attorney fees. The Woodward Group, the Lofton/Snow Group and NOR-AM objected to the standing of the Louisiana Entities Group on the ground that it had conferred no benefit on the class.

20. At the hearing, neither NOR-AM nor any other class member or counsel voiced any opposition to either the percentage of attorney fees requested by the Woodward Group, the Lofton/Snow Group, the Moppert Group and the Enhancement Group or the valuation of the benefit conferred, which was conservatively estimated during the hearing to be at least $42,500,000.00.

Conclusions of Law

A. Introduction

21. The hearing before the undersigned in this matter was conducted pursuant to Fed. R Civ. P. 54(d)(2), and Fed. R Civ. P 72(b). The undersigned, pursuant to the referral order of Chief Judge Butler, has conducted a hearing to resolve all pending issues regarding the award of attorney fees and expenses to counsel in this case.

B. The Benefit and Its Valuation

22. Under the terms of the settlement, two common funds -- the MMT Fund and the DCA Fund -- have been created for the benefit of class members. These two common funds must be valued in order to determine the value of the monetary benefit conferred upon the class. In setting an appropriate valuation upon the benefit conferred upon the class, the court should look not to the dollar amount of claims actually asserted against the fund, but rather to the total dollar amount of the fund available to pay claims. *See Boeing Co. v. Van Gemert, 41~1 U S* 472, 480, 100 S. Ct. 745, 750, 62 L.Ed.2d 676 (1980)("[Class members'] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.")(emphasis added).

23. The DCA Fund is comparatively easy to value, given that under the terms of the settlement NOR-AM is obligated to provide up to $34.5 million in funding to the DCA Fund. The total obligation in the initial Stipulation of Settlement for compensatory payments was $30 million. Later, in negotiations with the Enhancement Group, an additional $4.5 million was agreed upon as an amount to be added to the total obligation.

24. Assigning a value to the MMT Fund is more difficult, as it is to be funded with an initial deposit by NOR-AM of $3.5 million, and then replenished as necessary and without financial limitation over the course of its minimal 20-year lifetime. As a point of departure, one may take an extrapolation from the *Price* MMT Fund. The *Price* MMT Fund was valued by the court at $25 million based upon a stipulated class size of 25,000 members and consideration of certain actuarial data. Although no class size has been stipulated to between the parties, the underpinning of the settlement appears to be that the acreage on which Fundal was used was approximately two thirds of that on which Galecron was used, and that therefore this class numbers roughly two thirds that of the *Price* class. Applying this two thirds figure to the $25 million valuation of the *Price* MMT Fund to this MMT Fund yields a valuation of approximately $16.5 million. The analysis does not stop here, however Given that class members who were exposed to both Fundal and Galecron are to receive their medical monitoring and treatment benefits through the *Price* MMT Fund rather than this MMT Fund, and that the number of these class members is not insubstantial, the $16.5 million valuation should be reduced. Recognizing that any valuation would be inexact under the circumstances, the court, giving due consideration to the available facts before it, concludes that it is not unreasonable to assign a value of $8 million to the MMT Fund.

25. Taking the $8 million valuation of the MMT Fund together with the $34.5 million valuation of the DCA Fund, this court concludes that the common fund created for the benefit of the class is $42.5 million. This amount is a conservative but fair valuation of the total monetary benefit conferred on the class.

C. Assigning a Percentage

26. In the Eleventh Circuit, percentage awards are to be used in all common fund cases. *Camden I Condominium Association* v. *Dunk/e, 946* F.2d 768, 774 (11th Cir. 1991). The "benchmark" percentage rate is 25%. *Id,* at 774. However, the exact percentage in each case is to be determined by a fact specific review that includes consideration of the 12 factors identified by the court *in Johnson* v. *Georgia Highway Express, Inc.,* 488 **F.2d 714,** 717-19 (5th Cir. 1974). *See id*

27. The twelve factors set forth *Johnson* are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length

of the professional relationship with the client; and (12) awards in similar cases. *Camden I,* 946 F.2d at 772 n.3. In *Copper Liquor, Inc. v. Adolph Coors Co.,* 624 F.2d 575, 583 (5th Cir. 1980)(citations omitted), it was noted that four of these factors are entitled to "special" deference:

> "Although all of the *Johnson* factors must be considered, recent decisions of this Court suggest that district courts, in computing attorneys' fees, should pay special heed to *Johnson* criteria numbers (1) the time and labor involved, (5) the customary fee, (8) the amount involved and the results obtained, and (9) the experience, reputation and ability of counsel."

28. In *Camden* I, the Eleventh Circuit identified four additional factors and noted that yet other factors may be relevant in establishing the percentage award. *Camden* I, 946 F.2d at 775. The four additional factors are: (1) the time required to reach a settlement; (2) whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel; (3) any non-monetary benefits conferred upon the class by the settlement; and (4) the economics involved in prosecuting a class action. *Id*

29. The Woodward Group, the Lofton/ Snow Group, the Moppert Group and the Enhancement Group, at the July 11,.1996 hearing, petitioned jointly for an award of 20% Of the benefit conferred in this case. A review of the papers filed, the information presented at the hearing, the settlement-related documents, and the

court's May 16, 1996 Findings of Fact and Conclusions of Law, undertaken in light of the applicable *Johnson* and *Camden I* factors, supports the conclusion that the requested attorney fee award of 20% of the common fund created in this case is fair and reasonable.

30. With respect to those factors entitled to special deference, a more detailed analysis is in order. As to *Jonson* factor (1), the time and labor involved, the petitions of the Woodward Group, the Lofton/Snow Group, the Moppert Group and the Enhancement Group indicate that approximately ten thousand attorney hours were dedicated to the prosecution and resolution of this case, and, in addition, thousands of paralegal hours were expended. A review of the time records accompanying the various fee petitions indicates that this time and these resources were expended in a generally efficient and nonduplicative manner. Moreover, the time and resource commitment necessitated by this case precluded the attorneys from committing time and resources to other legal matters, including initiating and prosecuting new cases and or pushing other pending matters to an earlier conclusion.

31. *Johnson* factor (5), the customary fee, should be viewed in light of the contingency fee system. The customary contingency fee charged in personal injury and product liability cases is between 33 1/3 % and 40%, depending on the complexity and nature of the case. The requested 20% fee award is below the customary contingency fee. The customary fee should also be

viewed against the "benchmark" fee of 25% in common fund cases in this circuit.

32. In evaluating *Johnson* factor (8), the **amount involved and the results** obtained, the court finds that the efforts of petitioners have resulted in the creation of a benefit valued at $42.5 million. This is an extraordinarily large sum of money and is adequate to fairly compensate the members of the class. In addition, the class members have immediate access to free medical monitoring and treatmem. Moreover, these results were obtained in spite of novel and complex legal issues and the difficulties in dovetailing this settlement with a related pre-existing settlement.

33 . As to *Johnson* factor (9), the court takes due note that the attorneys of the Woodward Group, the Lofton/ Snow Group, the Moppert Group and the Enhancement Group are all experienced, of high reputation and thoroughly able. Were this not so, the court has grave doubts that this case could have overcome the many obstacles it faced on the road toward its successful resolution.

34. The foregoing detailed analysis of these factors meriting special consideration further support this court's conclusion that an award of attorneys amounting to 20% of the fund created for the benefit of the class is fair and reasonable.

D. Apportionment and Payment

35. The Woodward Group, the Lofton/ Snow Group, the Moppert Group and the Enhancement Group have requested that this court apportion the award of attorney fees to the groups in following manner, leaving the internal group apportionment to be determined by agreement of counsel:

a. $4, 950,000.00 to the Woodward Group;
b. $1,564,800.00 to the Lofton/Snow Group;
c. $1,135,200.00 to the Moppert Group; and
d. $ 850,000.00 **to the Enhancement Group.**

36. Pursuant to the notice, it was provided that some portion of the award made to administrative class counsel would be set aside to pay for future work during the start-up of the settlement. In that regard, it is appropriate that $300,000 of the award made to the "Woodward Group" be set aside and paid in equal installments during the first four years of the settlement. The "Woodward Group" will inform the administrator of the allocation of such fees for future work among their group, and the administrator shall pay those counsel as instructed by Administrative Class Counsel.

E. The Louisiana Entities Group

37. The petition for an award of attorney fee by the Louisiana Entities Group should be denied in its entirety. The

Louisiana Entities Group has in its filings failed to present a cogent argument as to how its actions in this case regarding Medicaid/Medicare issue in any way conferred a benefit on the class. During the course of this litigation, the Louisiana Entities Group attacked this settlement in its entirety before withdrawing all pleadings filed and withdrawing from the case. There is no evidence that the Louisiana Entities Group participated in any enhancements. The Louisiana Entities Group did not negotiate the settlement. The Louisiana Entities Group was not on the executive steering committee. The Louisiana Entities Group did not participate in the notice proceedings. The Louisiana Entities Group will not participate in the administration of the settlement. During the course of the hearing, an objection was made to the hearsay nature of certain self-serving affidavits attached to the application for attorney fees filed by the Louisiana Entities Group, and that motion is sustained In many respects the actions taken by the Louisiana Entities Group were antagonistic to the interests of the class members herein, and there is no basis for an award to that group.

F. Expense Reimbursement

38. During the hearing, the court also considered the pending requests for fees and expenses filed by counsel in the within matter. Subsequent to the hearing, supplemental and/or amended requests of expense reimbursement were filed by the Lofton/Snow Group and the Moppert Group.

39. The requests for expense reimbursements, which are paid from the DCA fund pursuant to the stipulation of settlement, are as follows:

Ness, Motley, Loadholt, Richardson & Poole, PA,	$ 14,017.66
Gardner, Middlebrooks, Fleming & Hamilton	$ 376.73
McKernan Law Firm	$ 1,148.93
Patrick W. Pendley	$10,869.66
The Dodson Group	$17,844.43
The Donaldson Group	$33,922.00
Briskman/Nations "Enhancement Group"	$160,103.40
TOTAL	**$238,282.81**

These amounts include the amended expense statement of the Donaldson Group and the petition of the Dodson Group, leave for which to file out of time was granted at the hearing The expense requests by counsel involved have been provided to counsel for NOR-AM who has not objected to amounts sought. Further, the petitions for reimbursement have been reviewed by the court. There is no indication that the expenses sought are excessive for a case of this magnitude, unreasonable or inappropriate. Therefore, the court concludes the petitions for expenses should be granted.

III Recommendation

In consideration of the foregoing, it is hereby recommended that:

1. The motions for attorney fees of the following groups of attorneys be GRANTED and fees authorized in the following amounts.

a. $4, 950,000.00 to the Woodward Group;

b. $ 1,564,800.00 to the Lofton/Snow Group;

c. $ 1,135,200.00 to the Moppert Group; and

d. $ 850,000.00 to the Enhancement Group.

As to the Woodward Group 's award, $300,000.00 should be set aside and paid in equal annual installments over the next four years for future services of Administrative Class Counsel. Such counsel shall instruct the Administrator on the apportionment of such future payments, and he shall pay them according to their instructions;

2. The motions for reimbursement of expenses of counsel be GRANTED pursuant to the stipulation of settlement, as follows:

Ness, Motley, Loadholt, Richardson & Poole, PA,	$ 14,01?.66
Gardner, Middlebrooks, Fleming & Hamilton	$ 376.73
McKernan Law Firm	$ 1,148.93
Patrick W. Pendley	$ 10,869.66
The Dodson Group	$ 17,844.43
The Donaldson Group	$ 33,922.00
Briskman/Nations "Enhancement Group"	$160, 103. 40

3. The petitions for fees and expenses filed by The Louisiana Entities and Mr. Zodhy be DENIED IN THEIR ENTIRETY.

AS INDICATED IN THE ATTACHED SHEET ANY OBJECTIONS TO THIS REPORT AND RECOMMENDATION MUST BE FILED WITHIN TEN DAYS.

DONE this 11th day of October, 1996.

S// William Cassady

WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE